
A BILL FOR AN ACT

RELATING TO THE PERMITTED TRANSFERS IN TRUST ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Hawaii relies heavily on the travel industry as
2 an economic engine. Because of instabilities in that industry,
3 the State must seek out other sources of revenue to help
4 stabilize the current budget crisis and fuel future economic
5 growth. Hawaii can build on proven domestic and international
6 estate and financial planning methodologies to amend its laws
7 for the purpose of attracting foreign-source capital.

8 The intent of this Act is to offer incentives to high net-
9 worth individuals throughout the United States and throughout
10 the world to transfer a portion of their liquid net worth into
11 this State for asset and trust management. This Act is designed
12 to increase the assets under management by Hawaii's private
13 financial sector, increase state tax revenues, and position the
14 State as a world-class financial management jurisdiction.

15 SECTION 2. The Hawaii Revised Statutes is amended by
16 adding a new chapter to be appropriately designated and to read
17 as follows:



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"CHAPTER

PERMITTED TRANSFERS IN TRUST

§ -1 Short title. This chapter shall be known and may be cited as the Permitted Transfers in Trust Act.

§ -2 Definitions. As used in this chapter:

"Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

"Creditor" means, with respect to a transferor, a person who has a claim.

"Debt" means liability on a claim.

"Former spouse" means a person to whom the transferor was married where the marriage was dissolved before the time of the permitted transfer.

"Permitted property" means United States currency or any other legal tender capable of conversion to United States currency or property capable of exchange on a governmentally regulated exchange within the United States including, but not limited to, American Depository Receipts (ADRs), exchange traded funds, common stocks, mutual funds, and any and all other



1 securities that a fiduciary is permitted to hold pursuant to the
2 Hawaii uniform prudent investor act, chapter 554C.

3 "Permitted transfer" means a transfer of permitted property
4 by or from a transferor to a permitted trustee by means of a
5 trust instrument, regardless of whether consideration is
6 exchanged.

7 "Permitted trustee" means a qualified natural person or
8 trust company that:

- 9 (1) Maintains or arranges for custody in this State of
10 some or all of the permitted property that is the
11 subject of the permitted transfer and of some or all
12 of the investments ultimately held in trust by the
13 permitted trustee;
- 14 (2) Maintains records for the trust on an exclusive or
15 nonexclusive basis;
- 16 (3) Prepares or arranges for the preparation of fiduciary
17 income tax returns for the trust; or
- 18 (4) Otherwise materially participates in the
19 administration of the trust.

20 "Person" means a natural person.

21 "Spouse" means a person to whom the transferor is married
22 at the time of the permitted transfer.



1 "Transfer" means the disposition, conveyance, or assignment
2 of permitted property to a permitted trustee or the exercise of
3 a power that causes the disposition, conveyance, or assignment
4 of permitted property to a permitted trustee.

5 "Transfer tax" means the tax described in section -12.

6 "Transferor" means an owner of permitted property; a holder
7 of a power of appointment that authorizes the holder to appoint
8 in favor of the holder, the holder's creditors, the holder's
9 estate, or the creditors of the holder's estate; or a trustee
10 who directly or indirectly makes a disposition of permitted
11 property.

12 "Trust instrument" means an irrevocable instrument
13 appointing a permitted trustee for the permitted property that
14 is the subject of a disposition.

15 § -3 **Perfected transfers.** The transfer of permitted
16 property under this chapter shall be deemed perfected following
17 the completion of all of the following:

- 18 (1) The delivery of permitted property by the transferor
19 to the permitted trustee and the written acceptance of
20 the permitted property by the permitted trustee;
- 21 (2) The delivery by the transferor to the permitted
22 trustee of a signed and notarized certificate of



1 solvency that states that the amount of the transfer
2 is equal to or less than twenty-five per cent of the
3 transferor's net worth and that the transfer will not
4 result in delay, defrauding, or hindrance of a
5 creditor who is known or knowable to the transferor at
6 the time of the permitted transfer with a claim
7 against the property that is subject to the transfer;
8 and

9 (3) The filing of the appropriate form with the Hawaii
10 department of taxation and payment of the attendant
11 transfer tax.

12 § -4 Permitted trustees. (a) A permitted trustee shall
13 be a person other than the transferor who is a resident of this
14 State or a trust company authorized to do business in this State
15 and to act as a trustee subject to supervision by the department
16 of commerce and consumer affairs and the Federal Deposit
17 Insurance Corporation.

18 (b) If a permitted trustee of a trust ceases to meet the
19 requirements of subsection (a) and there remains no trustee that
20 meets the requirements, the permitted trustee shall be deemed to
21 have resigned as of the time that the trustee no longer meets
22 the requirements of subsection (a). At that time, the successor



1 permitted trustee provided for in the trust instrument shall
2 become the permitted trustee of the trust. In the absence of
3 any successor permitted trustee provided for in the trust
4 instrument, a trust advisor or protector provided for in the
5 trust instrument shall appoint a successor permitted trustee.
6 In the absence of an appointed trust advisor or protector, a
7 Hawaii court of competent jurisdiction shall, upon application
8 of any interested party, appoint a successor permitted trustee.

9 (c) A permitted trustee may appoint an investment advisor
10 to manage the assets of the trust fund; provided that
11 administrative and non-administrative fiduciary responsibility
12 shall remain vested, as against beneficiaries of the trust, with
13 the permitted trustee.

14 § -5 **Trust instrument.** (a) A trust instrument shall be
15 irrevocable and shall expressly incorporate the laws of this
16 State governing the validity, construction, and administration
17 of the trust.

18 (b) A trust instrument shall not be deemed revocable on
19 account of the inclusion of:

20 (1) A transferor's power to veto a distribution from the
21 trust;



- 1 (2) A power of appointment other than a power to appoint
2 to the transferor, the transferor's creditors, the
3 transferor's estate, or the creditors of the
4 transferor's estate that may be exercised by will or
5 other written instrument of the transferor effective
6 only upon the transferor's death;
- 7 (3) The transferor's potential or actual receipt of
8 income, including rights to income retained in the
9 trust instrument;
- 10 (4) The transferor's annual receipt of a percentage not to
11 exceed five per cent of the initial value of the trust
12 assets or its value determined from time to time
13 pursuant to the trust instrument or of a fixed amount
14 that on an annual basis does not exceed five per cent
15 of the initial value of the trust assets;
- 16 (5) The transferor's potential or actual receipt or use of
17 the trust's principal due to the discretionary action
18 of a permitted trustee or to a provision in the trust
19 instrument that governs the distribution of principal;
20 provided that any included provision shall not confer
21 upon the transferor a substantially unfettered right
22 to the receipt or use of the principal;



- 1 (6) The transferor's right to remove a permitted trustee
2 or advisor and to appoint a new permitted trustee or
3 advisor;
- 4 (7) The transferor's potential or actual receipt of income
5 or principal to pay income taxes due on income of the
6 trust if the trust instrument includes a provision
7 allowing or directing the use of trust funds to pay
8 income taxes due or if the permitted trustee acts in
9 the trustee's discretion to allow payment of income
10 taxes due on the trust income; or
- 11 (8) A permitted trustee's authority pursuant to
12 discretion, direction, or the transferor's exercise of
13 a testamentary power of appointment to pay all or any
14 part of the transferor's debts outstanding at the time
15 of the transferor's death, the expenses of
16 administering the transferor's estate, or any estate
17 or inheritance tax imposed on or with respect to the
18 transferor's estate.
- 19 (c) A trust instrument may provide that the interest of a
20 beneficiary of the trust, including a beneficiary who is the
21 transferor of the trust, may not be transferred, assigned,
22 pledged, or mortgaged, whether voluntarily or involuntarily,



1 before the permitted trustee actually distributes the property
2 or income to the beneficiary. Any provision of this type
3 contained in the trust instrument shall be deemed to be a
4 restriction on the transfer of the transferor's beneficial
5 interest in the trust that is enforceable under applicable
6 nonbankruptcy law within the meaning of section 541(c)(2) of the
7 Bankruptcy Code, 11 U.S.C. section 541(c)(2), or any successor
8 provision.

9 (d) A transferor may appoint, through the trust
10 instrument, one or more advisors or protectors including, but
11 not limited to, the following:

12 (1) Advisors who have authority under the terms of the
13 trust to remove and appoint permitted trustees,
14 advisors, or protectors;

15 (2) Advisors who have authority under the terms of the
16 trust to direct, consent to, or disapprove of
17 distributions from the trust; and

18 (3) Advisors, including the transferor beneficiary of the
19 trust, who serve as investment advisors to the trust.

20 (e) If a trustee of a trust existing prior to the
21 enactment of this chapter proposes to make a permitted transfer
22 but the trust instrument does not contain a power of appointment



1 that conforms to section -5(b)(2), the trustee may deliver an
2 irrevocable written election to have section -5(b)(2) apply
3 to the trust and the nonconforming powers of appointment shall
4 be deemed modified to the extent necessary to conform with
5 section -5(b)(2). The irrevocable written election shall
6 include a description of the original transferor's powers of
7 appointment as modified and the original transferor's written
8 consent to the modification. Consent of the original transferor
9 to a modification of powers of appointment shall not be
10 considered to be a permitted transfer.

11 (f) If, in any action brought against a trustee of a trust
12 that results from a permitted transfer, a court declines to
13 apply the law of this State in determining the validity,
14 construction, or administration of the trust, or the effect of a
15 spendthrift provision of the trust, the trustee, immediately
16 upon the court's action and without the further order of any
17 court, shall cease to be trustee of the trust and a successor
18 trustee shall thereupon succeed as trustee in accordance with
19 the terms of the trust instrument. If the trust instrument does
20 not provide for a successor trustee or does not provide for an
21 advisor or protector with powers to appoint successor trustees,
22 a Hawaii court of competent jurisdiction shall appoint a



1 successor permitted trustee upon the application of any
2 beneficiary of the trust under any terms and conditions that the
3 court determines to be consistent with the purposes of the trust
4 and with this chapter. Upon the removal of a trustee pursuant
5 to this section, the trustee who has been removed shall have no
6 power or authority other than to convey the trust property to
7 the successor trustee.

8 § -6 **Investments.** Nothing in this chapter shall
9 prohibit a permitted trustee from diversifying permitted
10 property following the permitted transfer into asset classes and
11 investments in accordance with chapter 554C.

12 § -7 **Retained interests of transferor.** (a) A permitted
13 transfer shall be subject to this chapter notwithstanding a
14 transferor's retention of any or all of the powers and rights
15 described in section -5(b) and notwithstanding the
16 transferor's service as investment advisor pursuant to
17 section -5(b).

18 (b) The transferor shall have only the powers and rights
19 specifically conferred by the trust instrument. Except as
20 permitted by sections -4(b) and -5b, a transferor shall
21 have no rights or authority with respect to the property that is
22 the subject of a permitted transfer or to the income from



1 property that is the subject of a permitted transfer. Any
2 agreement or understanding purporting to grant or permit the
3 retention of any greater rights or authority shall be void.

4 § -8 **Avoidance of permitted transfers in trust.** (a) No
5 claim, including an action to enforce a judgment entered by a
6 court or other body having adjudicative authority, by a creditor
7 against property that is subject to a permitted transfer that
8 arises after a permitted transfer and no claim by a creditor to
9 avoid a permitted transfer shall be brought at law or in equity
10 for attachment or other provisional remedy unless the permitted
11 transfer was made with actual intent to defraud, hinder, or
12 delay the creditor.

13 (b) An allowable claim under subsection (a) of this
14 section shall be extinguished unless:

15 (1) The creditor's claim arose before the permitted
16 transfer was made and the action is brought on the
17 later of the date of the permitted transfer or the
18 date of the enactment of this section; or

19 (2) The creditor's claim arose concurrent with or
20 subsequent to the permitted transfer and the action is
21 brought within two years after the permitted transfer
22 is made.



1 (c) In any action described in subsection (a), the burden
2 to prove intent to defraud, hinder, or delay by clean and
3 convincing evidence shall be upon the creditor.

4 (d) For purposes of this section, a permitted transfer
5 that is made by a transferor who is a trustee shall be deemed to
6 have been made as of the date that the property that is the
7 subject of the permitted transfer was originally transferred via
8 a trust instrument that meets the requirements of this chapter
9 to the transferor or the transferor's predecessor in interest.

10 (e) Notwithstanding any law to the contrary, a creditor or
11 other person who purports to have a claim against property that
12 is the subject of a permitted transfer shall have only the
13 rights, with respect to a permitted transfer, as are provided in
14 this section and sections -9 and -10.

15 (f) No creditor or any other person shall have any claim
16 or cause of action, including but not limited to an action to
17 enforce a judgment entered by a court or other body having
18 adjudicative authority, against a trustee or advisor described
19 in section -4(c) or against any person involved in drafting,
20 preparing, executing, or funding a trust or in counseling the
21 parties to a trust that is the subject of a permitted transfer



1 if, as of the date of the action, the action would be barred
2 under this section.

3 § -9 **Limitations on permitted transfers.** The
4 limitations contained in section -8 on actions by creditors
5 to avoid permitted transfers shall not apply to:

6 (1) Any person to whom the transferor is indebted on
7 account of a family court-supervised agreement or
8 family court order for the payment of support or
9 alimony to the transferor's spouse, former spouse, or
10 children, or for a division or distribution of
11 property to the transferor's spouse or former spouse,
12 but only to the extent of the debt and not to any
13 claim for forced heirship, legitime, or elective
14 share; or

15 (2) Any person who suffers death, personal injury, or
16 property damage on or before the date of a permitted
17 transfer; provided that the death, personal injury, or
18 property damage is determined to have been caused in
19 whole or in part by the tortious act or omission of
20 either the transferor or another person for whom the
21 transferor is or was vicariously liable to the extent
22 of the transferor's liability or vicarious liability.



1 § -10 **Effect of avoidance of permitted transfers.** (a)

2 A creditor may avoid a permitted transfer pursuant to
3 section -8 only to the extent necessary to satisfy the
4 transferor's debt to the creditor at whose instance the transfer
5 has been avoided, together with costs, including attorneys'
6 fees, as allowed by a court.

7 (b) In an action pursuant to subsection (a) to avoid a
8 permitted transfer:

9 (1) If a court finds that a trustee has not acted with
10 intent to defraud, hinder, or delay the creditor in
11 accepting or administering the property that is the
12 subject of the permitted transfer:

13 (A) The trustee shall have a first and paramount lien
14 against the property that is the subject of the
15 permitted transfer in an amount equal to the
16 entire cost, including attorneys' fees, properly
17 incurred by the trustee in the defense of the
18 action or proceedings to avoid the permitted
19 transfer; and

20 (B) The permitted transfer shall be avoided subject
21 to payment of proper fees, costs, preexisting
22 rights, claims, and interests of the trustee and



1 of any predecessor trustee who has not acted with
2 intent to defraud, hinder, or delay the creditor;
3 and

4 (2) If the court is satisfied that a beneficiary of the
5 trust has not acted with intent to defraud, hinder, or
6 delay the creditor, the permitted transfer shall be
7 avoided subject to the beneficiary's right to retain
8 any distribution made prior to the creditor's
9 commencement of an action to avoid the permitted
10 transfer. For purposes of this paragraph, it shall be
11 presumed that a beneficiary did not act with intent to
12 defraud, hinder, or delay the creditor merely by
13 creating the trust or by accepting a distribution made
14 in accordance with the terms of the trust.

15 (c) A creditor who brings an action pursuant to
16 section -8 to avoid a permitted trust shall have the burden
17 of proving by clear and convincing evidence that a trustee or
18 beneficiary acted with intent to defraud, hinder, or delay the
19 creditor; provided that, in the case of a beneficiary who is
20 also the transferor, the burden on the creditor shall be to
21 prove by a preponderance of the evidence that the transferor-
22 beneficiary acted with intent to defraud, hinder, or delay the



1 creditor. Mere acceptance of permitted property by a trustee
2 shall not constitute evidence of intent to defraud, hinder, or
3 delay a creditor.

4 (d) Notwithstanding any other provision of this chapter, a
5 creditor shall have no right against the interest of a
6 beneficiary to a trust based solely on the beneficiary's right
7 to authorize or direct the trustee to use all or part of the
8 trust property to pay:

9 (1) Estate or inheritance taxes imposed upon or due to the
10 beneficiary's estate;

11 (2) Debts of the beneficiary's estate; or

12 (3) Expenses of administering the beneficiary's estate;
13 unless the beneficiary actually directs the payment of taxes,
14 debts, or expenses and then only to the extent of that
15 direction.

16 § -11 **Multiple transfers.** If more than one permitted
17 transfer is made by means of the same trust instrument:

18 (1) The making of a subsequent permitted transfer shall be
19 disregarded in determining whether a creditor's claim
20 with respect to a prior permitted transfer is
21 extinguished as provided in section -8; and



1 (2) Any distribution to a beneficiary shall be deemed to
2 have been made from the latest permitted transfer.

3 § -12 Taxation. (a) The State shall levy a one per
4 cent tax on all permitted transfers.

5 (b) The State shall not levy any other taxes against
6 trusts subject to this chapter; provided that Hawaii resident
7 taxpayers who receive actual or constructive distributions of
8 income or principal from trusts shall be subject to all
9 applicable taxes on that income."

10 SECTION 3. Section 525-4, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "~~§~~525-4~~§~~ Exclusions from statutory rule against
13 **perpetuities.** Section 525-1 shall not apply to:

14 (1) A fiduciary's power to sell, lease, or mortgage
15 property, and the power of a fiduciary to determine
16 principal and income;

17 (2) A discretionary power of a trustee to distribute
18 principal before termination of a trust;

19 (3) A nonvested property interest held by a charity,
20 government, or governmental agency or subdivision, if
21 the nonvested property interest is preceded by an



- 1 interest held by another charity, government, or
- 2 governmental agency or subdivision;
- 3 (4) A property interest in or a power of appointment with
- 4 respect to a pension, profit-sharing, stock bonus,
- 5 health, disability, death benefit, income deferral, or
- 6 other current or deferred benefit plan for one or more
- 7 employees, independent contractors, or their
- 8 beneficiaries or spouses; [~~or~~]
- 9 (5) A property interest, power of appointment, or
- 10 arrangement that was not subject to the common-law
- 11 rule against perpetuities or is excluded by any other
- 12 applicable law[~~-~~]; or
- 13 (6) A trust described in chapter _____, permitted
- 14 transfers in trust act."

15 SECTION 4. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 5. This Act shall take effect on July 1, 2010;

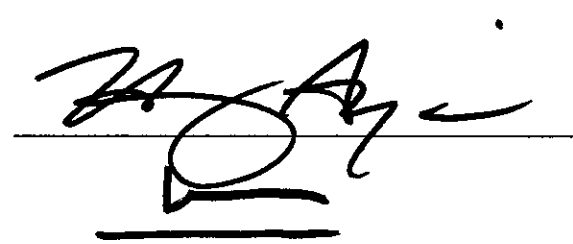
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1 provided that section 2 shall apply to permitted transfers made
2 after the effective date of this Act.

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INTRODUCED BY:

A handwritten signature in black ink, appearing to read "J. Agui", is written over a horizontal line. Below the line, there is a thick, dark horizontal stroke.

JAN 26 2010



Report Title:

Permitted Transfers in Trust Act; Rule Against Perpetuities

Description:

Creates the Permitted Transfers in Trust Act to govern transfers of currency, bonds, and securities from a transferor to a trustee by means of an irrevocable trust instrument. Specifies that the rule against perpetuities does not apply to transfers pursuant to the Permitted Transfers in Trust Act.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

